IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 292 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)

Versus

GUNVANTLAL H SHAH - Opponent(s)

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Appearance :
MR KP RAVAL APP for Appellant
MR US BRAHMBHATT for respondent – appointed by Legal Aid.
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 16/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. The acquittal of the respondent ('the accused') of the offence punishable under Section 161 of the Indian Penal Code ('the IPC' for short) and Section 5 (1) (d) and 5 (2) of the Prevention of Corruption Act ('the Act' for short) recorded by the learned Special Judge, Mehsana vide judgment and order dated 16.10.1985 rendered in Special Case No. 3 of 1984 is the subject matter of challenge in instant appeal which is filed under Section 378 of the Code of Criminal Procedure ('the Code' for short) by the appellant – State of Gujarat.

2. The prosecution case as reflected from the complaint dated 19.12.1983 filed by Nagindas Tulsidas Acharya ('the complainant'), before Police Inspector, ACB, Mehsana and unfolded during trial was as under:

2.1. As per the complaint, since 1.11.1982, the complainant was serving as Manager-cum-Mantri in

the fair-price shop run in the Mehsana Police Head Quarters by Police Employees Consumer Cooperative Stores (“Mandali” for short) and he used to manage the affairs related to purchase and sale of the goods in the shop. In the said shop Sadatkhan Husenkhan Pathan was serving as Tolat. Before the complainant took over the charge, one Mahendrabhai Chandulal Joshi was serving in the shop. Mandali was granted loan of Rs.4500/- for purchasing furniture for the said shop but the said loan was not utilized for the purpose for which it was availed but the loan was utilized for purchasing some other items and in this regard necessary entries were made in the daily account book. After that as he got employment as Talati cum Mantri, the charge of the said shop was given to the complainant. After taking over the charge of the said shop, Gunvantbhai Haribhai Shah ('the accused' for short), Officer of the office of the District Registrar, came for inspection in the month of

February 1983. He checked up the accounts and informed that the loan amount was not used for the purpose for which it was sanctioned and thereby the said loan amount was misused by the shop. The complainant informed him that he took over the charge of the said shop after the said amount of loan was granted and spent and he did not know anything about it. The accused told him that he should have verified the accounts before taking over the charge of the shop. Thereupon the complainant told the accused that he may make arrangement for repayment of the loan after making inquiries with Mahendrabhai who was serving earlier in the shop. The accused at that time told the complainant that he may do whatever he wanted to do but he must immediately deposit Rs.4500/- otherwise action would be taken against him. At that time the complainant told the accused that some time may be given so that he can make arrangement for depositing the amount but the accused must see to it that nothing would

happen to him. At that time the accused told him that if he wanted relief he should pay Rs.2,000/- to him. Therefore the complainant gave Rs.1500/- to the accused. At that time only Sadatkhan, the Tolat, was present.

2.2. Thereafter a letter was received by the complainant before 18.11.1983 from the office of the District Registrar regarding inspection of his shop and the complainant made necessary preparation for the inspection. In the meantime, somewhere before 18.11.1983, the accused came to his shop and inquired whether he received the letter intimating him about the inspection of the shop to which the complainant told that he got it. The accused asked him whether the amount of loan was deposited or not and if not deposited then it may be deposited before the inspection otherwise report will be made about the incident to the higher ups and in case of filing of any case he will be in difficulty. The complainant

told the accused that it would be difficult to repay the said amount before 18.11.1983 and hence some change may be made in the programme. Thereupon the accused told him that he understood when the relief was given earlier and if he understands this time also then relief will be given. The complainant told that he was not in a position to make arrangement and after some days he will make arrangement and he will do as told by him. The accused told him that after receiving the salary he may see him and at that time the complainant and Sadatkhan, the Tolat, both were present. Thereafter he did not go to see the accused.

2.3. After that, on 16.12.1983 when the complainant reached his house his wife told him that some Gunvantbhai Shah came and asked the complainant to see him the next day or the day thereafter. Therefore, on that day the complainant went to the office of the District

Registrar and met Gunvantbhai Shah and he called him to drink tea and along with him he came down and he took the complainant to one side and told that the said loan amount was not paid by him, so what to do. On that day or the day after they will come for inspection and as told by you earlier why he did not come to see him and even the loan was not paid. The complainant told that it was not possible to repay the loan, and he may give some relief. At that time the accused told that like last time Rs.1500 should be given to which the complainant informed that such a huge amount cannot be given but some reasonable amount may be given. The accused, therefore, asked to give Rs.1,000/- and told that the things will be over. The complainant told that at that time where from he would bring the money but in three different installments the same would be given. The accused told that on that day after office hours at about 6 to 6.30 he will come to his house and he may make arrangement for Rs.300/-

and thereafter taking tea they departed.

2.4. The complainant was of the opinion that it was not proper to give illegal gratification demanded by the accused and, therefore, he had contacted P.I. ACB Mehsana who recorded his complaint at Ex.37.

2.5. After recording of the complaint, two panch witnesses were summoned at the instance of the Police Inspector. The panchas and the complainant were introduced to each other. The complainant had read over the complaint to the panch witnesses and thereafter the complainant had produced three currency notes of Rs.100 denomination. The number of the notes were noted in panchnama and thereafter the notes were smeared with anthracene powder and experiment with ultra violate lamp was carried out and after that the said three notes were put in the pocket of the bush-shirt of the complainant by Head

Constable Arvindbhai with instruction not to touch them unless and until demand was made by the accused for illegal gratification. Thereafter necessary instructions were given to the raiding party and thus first part of the panchnama was completed at the ACB Office, Mehsana.

2.6. Thereafter the complainant in the company of Panch No.1 and the members of the raiding party proceeded towards his house as the accused had told him that he will come to his house. The complainant, Panch No.1 and the members of the raiding party went to the house of the complainant and Panch No.2 and Head Constable Nathuji and Police Constable Takhuji both sat in the room adjacent to the room in which Panch No.1 and complainant were sitting. The PI and and other members of the raiding party were standing outside the house of the complainant. At about 6.35 PM the accused came to the house of the

complainant and verified the presence of the complainant in his house. Since the complainant was in his house he called the accused in the house. The accused came inside the house and inquired as to what happened with regard to their previous talk and asked whether arrangement was made to which the complainant told that he made arrangement. Thereupon the accused asked him to give the money. The complainant told him that he had arranged for Rs.300. The accused demanded the amount and thereupon the complainant took out the three currency notes of 100 denomination from the left side pocket of his shirt. The accused accepted the said currency notes in his hand and put them in the left side pocket of his bush shirt. The complainant gave signal and thereupon the members of the raiding party went inside the house of the complainant. At that time the accused was sitting near the complainant. The PI showed his identity card to the accused and told him to sit in the same position and asked where

did he put the currency notes which he demanded and accepted from the complainant. Thereafter three currency notes were taken out from the pocket of the bush shirt of the accused with the help of Panch No.1 and the numbers of the currency notes were tallied with the numbers which were noted in the first part of the panchnama. Thereafter again experiment on the currency notes with the help of ultra violet lamp was performed. The experiment with the ultra violet lamp on the hand of the complainant as well as the accused was also performed. Anthracene powder was found on the currency notes, hands of the accused as well as the complainant. Thereafter second part of the panchnama was concluded.

2.7. Since the trap was successfully carried out, the offence was registered on the basis of the complaint filed by the complainant against the accused at ACB Police Station, Mehsana for

commission of the offenses under sections 161 of IPC and under section 5 (1) (d) and 5 (2) of the Act.

2.8. Pursuant to the registration of the complaint, investigation was put into motion. During the course of the investigation, statements of the complainant as well as panch witnesses and other witnesses were recorded. As the accused was a public servant, necessary sanction under the Act from the competent authority to prosecute him was requestioned and on receipt of such sanction and as sufficient incriminating evidence was collected to prosecute the accused for commission of the offenses as alleged, he was charge-sheeted in the court of learned Special Judge, Mehsana.

2.9. The learned Special Judge framed charge against the accused for commission of the offence under section 161 of IPC and also under section 5

(1) (d) and 5 (2) of the Act. The charge was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried and thereupon he was put to trial and tried by the learned Special Judge, Mehsana in Special Case No.3 of 1984.

2.10. To prove the culpability of the accused, the prosecution examined following three witnesses and relied upon their oral testimony:

(i) P.W.1, Nagindas Tulsidas, complainant, Ex.18.
(ii) P.W.2, Balvantbhai Kachrabhai Chauhan, Panch No.1, Ex.33.
(iii) P.W.3, Takhatsing Muluji Parmar, P.I. ACB, investigating officer, Ex.36.

2.11. To prove the charge against the accused, the prosecution has also produced documents like complaint, Ex.37, panchnama Ex.34, letter of section to prosecute the accused, Ex.38, etc.,

and relied upon the contents thereof.

2.12. After recording of the evidence of the prosecution witnesses was over, the learned Special Judge explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement he denied the case of the prosecution in toto. Except producing his written statement at Ex.58, he has not led any evidence nor examined any witness to support his defence.

2.13. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the learned Special Judge came to the conclusion that the evidence adduced by the prosecution is unreliable and not trustworthy as there was no reason for the complainant to give the illegal gratification to the accused as he was not responsible for the

act of not utilizing the loan amount for the purpose for which it was sanctioned. It was also held that the panchas were selected and therefore they were interested witnesses and hence no reliance can be placed upon their oral testimony. On the aforesaid premises, it was held by the learned Special Judge that the prosecution has failed to prove the charge levelled against the accused beyond reasonable doubt and a doubt was raised on the prosecution case and hence he acquitted the accused of the offence with which he was charged giving rise to this appeal at the instance of the appellant – State of Gujarat.

3. Mr. KP Raval, learned APP for the appellant – State of Gujarat after taking us through the entire testimonial collections on the record has made the following submissions:

(a) There is cogent, reliable and trustworthy evidence on record about the demand and

acceptance of illegal gratification as a motive or reward by the accused and the said amount was recovered from him.

(b) The complainant is compelled to give the bribe. He is an unwilling bribe giver. His evidence is trustworthy, reliable and beyond any reasonable doubt and from his evidence the complaint Ex.37 is proved. He might have made some omissions or contradictions in his oral testimony. But by that fact alone his evidence cannot be discarded.

(c)The evidence of Panch witness No.1 at Ex.33 is also reliable and trustworthy and his evidence is also required to be believed. There may be some discrepancy or contradiction in his evidence to which much weightage may not be given. Merely because both the panchas belong to same community i.e., Scheduled Caste and serving in the same office that by itself cannot impeach

their credibility and make their evidence unreliable and untrustworthy. They are not selectee of the complainant or the Investigating Officer.

(d) The evidence of the investigating officer is also trustworthy and reliable and he has no reason to speak lie. He cannot be called interested witness as he is an independent witness and so his evidence is required to be believed.

(e) The written explanation tendered by the accused at Ex.58 is totally false and no reliance can be placed upon the same.

4. On the aforesaid premises, it is submitted by Mr. Raval, learned APP that case against the accused for demand, acceptance, and recovery of illegal gratification is proved and therefore he should be held guilty of the offence with

which he was charged. He therefore submitted that the impugned judgment and order of acquittal of the accused deserves to be quashed and set aside by allowing this appeal. He therefore urged to allow this appeal and the accused may be held guilty of the offence with which he was charged and punish him according to law.

5. Per contra, Mr. U.S. Brahmbhatt, learned advocate appointed by this Court to assist the accused under Legal Aid, has vehemently contended that there is no reliable and trustworthy evidence with respect to motive of demand, acceptance and recovery of the bribe from the accused. He has further submitted that the prosecution evidence on record when minutely perused in face of settled principles of anti corruption case laws as to the appreciation of evidence, showed that the prosecution has utterly and miserably failed to prove the case against the accused and, therefore, accused deserved to

be acquitted. He does not rest here. According to him, there is no substratum of the prosecution case and it was neither of the function of the accused to give the account or to satisfy the accused with respect to the loan which was sanctioned for purchase of furniture which was not utilized for the purpose for which it was sanctioned as he joined the service after the loan was sanctioned and utilized for some other purpose. Therefore, this basic significant aspect smashes the persecution case and the witnesses examined by the prosecution all are liers and therefore their evidence is required to be totally disregarded being false and fabricated.

6. His submissions can be catelogued as under:

(i) Firstly, he assailed on the complainant himself. According to him, the complainant is a lier and not a witness of sterling quality.

(ii) Initial demand of Rs.1500/- and acceptance by the accused is not proved as it does not get corroboration of independent witness, Sadatkhan, Tolat, who was from the office of the complainant and according to the complainant in his presence the amount of Rs.1500/- was demanded by the accused, paid to him and was accepted by him.

(iii) The complainant belongs to schedule caste. However, he has identified himself as Brahmin in the society which reflects on his credibility. He has selected two panchas of his own community and therefore the panchas are selectee of the complainant.

(iv) Both the panchas are selected by the complainant from the same office and they belong to his caste. Without verifying this aspect the investigating officer accepted both the panchas which reflects on the credibility of the evidence of the investigating officer.

(v) The accused is wrongly trapped by the complainant with the help of two panchas who are his caste fellows.

(vi) Explanation offered by the accused in written statement is in consonance with the evidence adduced by the prosecution and therefore there is no reason to disregard the said explanation.

(vii) On the aforesaid premises, he submitted that the learned Special Judge has very rightly recorded the finding of not guilt and held that doubt is raised on the prosecution case and, therefore, he rightly acquitted the accused of the offence with which he was charged.

(viii) It is also submitted that this is an acquittal appeal where the scope to interference of this court is very limited. According to him, even if two views are possible, one leads to

innocence and another to guilt then the view favourable to the accused must be accepted and in acquittal appeal the appellate court cannot substitute its own view if the view taken by the trial Judge is found to be reasonable.

He therefore submitted that the appeal lacks merit and deserves to be dismissed. He therefore urged to dismiss the appeal.

6. We have considered the submissions advanced by the learned advocates appearing for the parties, taken into consideration testimonial collections in the nature of ocular evidence as well as documentary evidence and reported decisions of the Supreme Court laying down proposition of law with regard to appreciation of evidence in bribe case.

7. The case against the accused was for demanding and accepting illegal gratification to

which he was not entitled to in his capacity as a public servant in discharge of his public duties. The ingredients of charge under Section 161 of the IPC and Section 5 (2) of the Act may be briefly stated as follows:

(i) That the accused was a public servant;

(ii) That he must be shown to have obtained from any person any gratification;

(iii) The gratification should be other than legal remuneration as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show in exercise of his official function favour of disfavour to the person.

8. When the first two ingredients are proved by the evidence, a rebuttable presumption arises in respect of the third ingredient and in absence of proof of first two facts, the presumption does not arise. On mere recovery of certain money from

the person of accused without proof of payment or on behalf of such person to whom official favour was to be shown, the presumption cannot arise (See Sita Ram v. State of Rajasthan, AIR 1975 SC 1432.

9. It must also be remembered that Section 161 of IPC does not require that the public servant must, in fact, be in a position to do the official act, favour or service at the time of the demand or receipt of the gratification. To constitute an offence under this section, it is enough if the public servant who accepts the gratification, takes it by inducing a belief or by holding out that he would render assistance to the giver 'with any other public servant' and the giver gives the gratification under that belief. It is further immaterial if the public servant receiving the gratification does not intend to do the official act, favour or forbearance which he holds himself out as capable of doing (See

Chaturdas Bhagwandas Patel v. State of Gujarat, AIR 1976 SC 1497).

10. Another important test which must be remembered is that where the recovery of the money coupled with other circumstances leads to the conclusion that the accused received illegal gratification from some person, the Court would certainly be entitled to draw the presumption under Sec.4 (1) of the Act. Even under Section 114 of the Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, in their relation to the facts of the particular case (See Hazarilal v. The State (Delhi Administration) AIR 1980 SC 973).

11. Where in a trap case, the Judge magnifies every minor detail or omission to falsify or throw even a shadow of doubt on the prosecution

evidence, then it would be the very antithesis of a correct judicial approach to the evidence of witnesses in a trap caste Indeed, if such a harsh touchstone is prescribed to prove such a caste, it will be difficult for the prosecution to establish any case at all (See State of Maharashtra v. Narsingrao Gangaram Pimple, AIR 1984 SC 63.

12. Thus, the Court of Special Judge should invariably be aware of the correct judicial approach in a trap caste and see that it does not enter into exercise of magnifying minor details and omissions only with a view to falsify witnesses and throw overboard the prosecution caste.

13. In the back drop of the aforesaid settled principles enunciated by the Supreme Court with regard to appreciation of evidence in a bribe case, we may now advert to the actual evidence on

record to find out as to whether the prosecution has established its case against the accused that in his capacity as public servant he demanded and accepted the amount of Rs.300/- as bribe from the complainant for not inspecting the fair-price shop.

14. In this connection, adverting to the oral testimony of the P.W.1, Nagindas Tulsidas, Ex.18, in his chief examination, inter alia, he has testified as per the averments made in the complaint at Ex.37. He has also testified that at the first instance the accused demanded Rs.1500/- which was paid by him and accepted by the accused in the presence of Sadatkhan, Tolat of his office. In the examination-in-chief he has also testified as to how the trap was laid and the accused demanded illegal gratification in the presence of panch No. 1 which was given by him and accepted by the accused and on giving signal members of the raiding party assembled there and

with the help of Panch No. 1 currency notes were taken out of the pocket of the shirt of the accused and experiment made on the currency notes, on the hands of the accused and on his hands with ultra violet lamp. In his cross-examination he has stated that he has hired a house from a person belonging to Scheduled caste and he is Vaishnav Brahmin by caste. He has admitted that he was not liable to repay the loan amount of Rs.4,500/- which was sanctioned by the office of District Registrar to the Mandali. He has also testified that managing committee had passed a resolution to the effect that sanctioned loan was not required and therefore the said amount was credited to capital account and therefore the said amount was deposited in the District Cooperative Bank. According to him, office of the District Registrar was insisting that they should redeposit the said amount in the office of the District Registrar as they have not purchased the furniture. He has also testified

that in his presence his office was inspected twice by the office of the District Registrar. The auditor of the office of the District Registrar has made a report that they should redeposit the amount of Rs.4500/- as they have not purchased the furniture. It has also come in the evidence that he has informed the management to redeposit the said amount in the office of the District Registrar. The management informed him not to redeposit the said amount. He has further testified that his surname, is Acharya and another surname is Mehta. His name is Jayantilal Sadhu and his son-in-law is serving as police constable. His brother is also serving in computer section of the police department. He does not know as to whether both panchas are the members of Scheduled Caste. He has, however, admitted that both were serving in Social Welfare Department.

15. On reappreciation, reanalysis, reevaluation

and close scrutiny of the evidence of P.W.1, Nagindas Tulsidas, the complainant, according to this court, it was the prosecution case that the accused has demanded Rs.1500/- at the first instance and it was paid by the complainant and accepted by the accused in the presence of Sadatkhan, Tolat, working in the office of the complainant. However, though the investigating officer has recorded his statement, he was not examined by the prosecution. If the prosecution would have examined Sadatkhan, then the allegation with respect to the first demand of Rs.1500/- and acceptance by the accused would have got support and the averments made by the complainant in his complaint would have been strengthened. Therefore, so far as the first demand of Rs.1500/- and acceptance by the accused is concerned, the complainant's evidence does not get corroboration from independent source of evidence. Therefore, it has become doubtful whether Rs.1500/- was ever demanded and accepted

by the accused. It is also not swallow-able that for non-repayment of an amount of Rs.4500/- one would demand Rs.1500/- twice and that too when the complainant was not liable to repay the amount of Rs.4500/- which was sanctioned by the office of the District Registrar, Cooperative Societies to the Mandali and the liability to repay the said amount of Rs.4500/- was that of the Mandali. It is also reflected from his evidence that the managing committee has passed a resolution to the effect that sanctioned loan was not required and, therefore, the said amount was credited to capital account and hence the said amount was deposited in the District Cooperative Bank. If that be so, then why the complainant has paid Rs.1500/- to the accused. A man of ordinary prudence would never accept the evidence of the complainant. It has also come in evidence that he has already informed the management to redeposit the said amount in the office of the District Registrar but the management has

informed him not to redeposit the said amount. It has also come in evidence that he has identified himself with two surname, one Acharya and another Mehta and his name is Jayantilal Sadhu. Therefore, according to us, he is of a dubious character. It also impeaches his credibility. The sum and substance of the aforesaid evidence unequivocally suggests that he is not a witness of sterling quality and no reliance can be placed on his oral testimony unless it gets corroboration from another independent witness in that respect.

16. Now adverting to the oral testimony of P.W.2, Balvantbhai Kachrabhai Chauhan, recorded at Ex.33, who is Panch witness No.1, he has testified that at the relevant time he was serving as C clerk in the office of the Social Welfare Department. He and one Vinubhai both were called by their superior officer Desai in his chamber and he informed both of them to accompany

Head Constable. They therefore accompanied the Head Constable to the ACB Office. Both of them were called by Police Inspector Parmar. He ascertained their willingness to act as Panchas. Thereafter on showing their willingness they were introduced to the complainant and the complaint filed by the complainant was read over and explained to them. They also signed on the said complaint. Thereafter usual experiment with anthracene powder on the currency notes produced by the complainant was performed in their presence by Arvindbhai, Head constable. He has more or less stated the same version as stated by the complainant. It would be relevant to refer to the cross-examination of this witness made by the learned advocate of the defence. He has testified that he and another Panch both belong to Scheduled Caste. He has not denied that the complainant does not belong to Scheduled Caste. He has also testified that the surname of the complainant Naginbhai is Acharya and therefore he

thought that he is a Brahmin. He also came to know through the complainant that he is a Brahmin. He denied that the currency notes were thrust into the pocket of the accused. On analysis of the evidence of the Panch witness No.1, it reveals that both panchas belong to same community i.e., scheduled caste and also from the same office i.e., from the office of the Social Welfare Department.

17. On reappreciation, reanalysis, reevaluation and close scrutiny of the evidence on record, it has become doubtful as to whether the complainant belongs to scheduled caste or Brahmin caste. Therefore, the possibility cannot be ruled out that both the panchas are selectee either of the complainant or of the investigating officer. Panch No.1 has also stated that he was the author of the panchnama as he dictated the panchnama to police constable.

18. On perusal of the oral testimony of Takhatsinh Muljibhai, P.I., A.C.B., Mehsana, Investigating Officer recorded at Ex.36, it is clear that he has not made thorough investigation. In his oral testimony and more particularly in cross-examination made by the learned advocate of the defence, he admitted that he has not inquired as to whether the amount of Rs.1500 allegedly paid by the complainant to the accused at the first instance i.e., prior to lodging of the complaint was that of the society or of his personal money. He also admitted that he has not recorded the statement of the President, Vice President or any of the member of the Managing Committee and he had also inspected the books of accounts of the Mandali. He has not inquired from the complainant about the balance in the books of accounts of the Mandali. He has verified from the books of accounts of the Mandali that the loan amount of Rs.4500 was not

utilized for the purpose for which it was granted and it was to be repaid by the Mandali. He has not asked the explanation from the complainant why he has not repaid the said amount to the office of the District Registrar. He has unequivocally admitted that on seeing the books of accounts he came to the conclusion that the complainant was not responsible for repaying the amount of Rs.4500. However, he did not find it proper to take further explanation from the complainant in this regard. So far as selection of Panchas is concerned, in para 3 of the cross-examination he has admitted that there are other government offices adjacent to his office and he could have procured service of the panchas from other office as well. However, he has called two panchas from the office of the Social Welfare Department which is far away from his office than other offices. He has also not inquired about the acquaintance of the complainant with the panchas. He had the knowledge that both the

panchas belong to Scheduled Caste. He has also satisfied that the complainant was staying in the Schedule Caste society. So far as the writing of the Panchnama is concerned, he has admitted that he dictated the panchnama and police constable took down the dictation.

19. It may be noted at this stage that there is discrepancy in the evidence of Panch witness and investigating officer with regard to the authorship of the panchnama. As per the evidence of Panch No.1 he was the author of the panchnama as he dictated the panchnama to police constable whereas as per the evidence of the investigating officer, he was the author of the panchnama and he has dictated the panchnama to police constable.

20. Be it as it may. According to us, from the aforesaid evidence of the panch witness No.1 as well as the investigating officer the credibility

of both of them are doubtful and it impeaches their credibility as they are not telling the correct version in the court. If the Panch witness is not the author of the panchnama then panchnama is merely an ornament without having the probative value and hence the panchnama is not a substantive piece of evidence and no reliance can be placed on it.

21. On reappreciation, reevaluation, reanalysis and close scrutiny of the evidence of the investigating officer, there is no manner of doubt that he has not investigated the case thoroughly. He has unequivocally admitted that on seeing the books of accounts he came to the conclusion that the complainant was not responsible for repaying the amount of Rs.4500/-. However, he did not find it proper to take further explanation from the complainant in this regard. So far as selection of panchas is concerned, in para 3 of the cross-examination, he

has admitted that there are other government offices adjacent to his office and he could have procured service of the panchas from other office as well. However, he has called two panchas from the office of the Social Welfare Department which is far away from his office than other offices. He has also not inquired about the acquaintance of the complainant with the panchas. He had the knowledge that both the panchas belong to Scheduled Caste.

In view of the aforesaid evidence, according to us, the investigating officer has failed to discharge his duties before laying the trap with regard to the inter-se relationship between the complainant and the panchas as well as to take further explanation of the complainant as to why the accused has demanded the bribe from him for not repaying the loan amount of Rs.4500/- which was not his responsibility.

22. In the case of Kishorchandra Mansukhlal Joshi v. State of Gujarat, 1985 GLH 103 a Division Bench of this Court has held as under:

> “In corruption case the whole case depends upon the credibility of only two persons, the complainant and the panch. The career of a public servant depends on the evidence of the two persons and when examined carefully, ultimately it would depend upon one person and that one person would be a person who would be a panch witness in the case. Creditworthiness of that person would be most important criteria. One unscrupulous complainant if could find out one person to support him the career of any public servant could be put to an end. Under these circumstances, caution demands that the evidence of the complainant and the panch should be such by which no doubt is left to the mind of a Judge in regard to the credibility and ultimately therefore, acceptability of the evidence of the complainant and the panch witness.”

23. In the case of Raghbir Singh v. State of Punjab, AIR 1976 SC 91, the Supreme Court has held as under:

> “The officers functioning in the anti corruption department must seriously endeavour to secure really independent and respectable witnesses so that the evidence in regard to raid inspire confidence in the mind

> of the court and the court is not left in any doubt as to whether or not any money was paid to the public servant by way of bribe. They should insist on observing this safe-guard for the protection of public servant against whom a trap may have been laid."

24. Applying the principles laid down by the Supreme Court as well as the Division Bench of this Court in the aforesaid decisions to the facts of the present case, when the complainant's evidence does not inspire confidence and panch witnesses are selectee of the investigating officer at the instance of the complainant it raises serious doubt on the prosecution case. Therefore, no reliance can be placed on the oral evidence of Panch No.1 as well as the investigating officer.

25. At the cost of repetition, be it stated that in the instant case, evidence adduced by the prosecution raises serious doubt as their evidence impeaches their credibility and, therefore, no reliance can be placed upon their

oral testimony and the evidence of the complainant does not get corroboration from independent witness i.e., Panch who is a selectee and in selection of the panch investigating officer has also over-acted and, therefore, he also loses his credence.

26. At this stage, it is also appropriate to refer to the written statement tendered by the accused along with his further statement which is produced at Ex.58. The accused has inter alia stated that he is innocent and has not committed any offence. He has been wrongly entrapped by the complainant. He has stated that the District Registrar, Mehsana has issued an order to inquire about the loan amount of Rs.4500/- granted to the Mandali for purchasing furniture which has been utilized for some other purpose. He therefore inspected the Mandali on 22.3.1983. Thereafter he sent inspection report to the District Registrar, Cooperative Societies wherein he has

specifically opined that the loan amount of Rs.4500 shall be ordered to be paid in the Government Treasury along with interest. He has also sent a copy of the said report to the Mandali also and thereafter he informed the Mandali by letter dated 2.4.1983 to deposit the said amount within a period of four days. Thereafter he also informed the Mandali on 17.5.1983 to deposit the said amount within four days with the District Registrar. Thereafter again he informed the Mandali on 4.10.1983 to deposit the said amount failing which appropriate steps would be taken against the Mandali for committing breach of the conditions as the amount of loan amount was not utilized for the purpose for which it was granted. He has also stated that there was no question of taking any action against the complainant in his individual capacity as it was not his personal liability to repay the loan amount and it was the liability of the Mandali and the complainant has made false

version in his complaint that he had accepted Rs.1500 prior to filing of the complaint. It was also stated by him that on the day of the alleged incident i.e., 19.12.1993 when the trap was laid the complainant has come to his office and met him and told him that he has arranged the amount of loan. However, he does not know how to write the accounts and therefore he brought the books of accounts to his residence and requested him to come to his house. Thereupon he has stated that during evening hours he would come to the house of Hirabhai Parmar, a Sitting MP who is staying in Sarvoday Society, in connection with the information of 20 Point Programme. He therefore went to the house of Hirabhai Parmar during the evening hours where the complainant came and called him to his residence. Therefore, he went to his residence. He has also asserted that the complainant and both the Panchas belong to the same community i.e., Scheduled Caste. Therefore at the instance of the complainant,

P.I. called them at his office on 19.12.1983 at 3.30 P.M. and in their presence complaint as well as Panchnama was prepared. He has also stated that the complainant also belongs to scheduled caste and therefore he had very good relations with the two panchas. Therefore they are selectee and not independent panchas.

27. A comparative analysis of the evidence of the prosecution witnesses and the further statement of the accused we are of the opinion that according to us the statement of the accused inspire confidence trustworthy and reliance can be placed upon them.

28. At this stage, it would be advantageous to refer to the decision of the Supreme Court in the case of Aher Raja Khima v. State of Saurashtra, AIR 1956 SC 217. In the said decision, the Supreme Court has held that there are two important factors in every criminal trial that

weigh heavily in favour of an accused person; one is that the accused is entitled to the benefit of every reasonable doubt and the other, an off-shoot of the same principle, that when an accused person offers a reasonable explanation of his conduct, then, even though he cannot prove his assertions, they should ordinarily be accepted unless the circumstances indicate that they are false.

29. In the case of Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170, the Supreme Court has observed as under:

> ”(1) that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case;
>
> (2) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and
>
> (3) that the onus of proof never shifts. It is true that under sec.105 of the Evidence Act the onus of proving exceptions mentioned in the Indian Penal Code lies on the accused, but this section does not at all indicate the nature and standard of proof required. The

> Evidence Act does not contemplate that the accused should prove his case with the same strictness and rigour as the prosecution is required to prove a criminal charge. In fact, from the cardinal principles referred to above, it follows that it is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by sec.5 of the Evidence Act as a result of which he succeeds not because he proves his case to the hilt but because probability of the version given by him throws doubt on the prosecution case and, therefore, the prosecution cannot be said to have established the charge beyond reasonable doubt. In other words, the mode of proof, by standard of benefit of doubt, is not applicable to the accused, where he is called upon to prove his case or to prove the exceptions of the Indian Penal Code on which he seeks to rely. It is sufficient for the defence to give a version which competes in probability with the prosecution version, for that would be sufficient to throw suspicion on the prosecution case entailing its rejection by the Court. This aspect of the matter is no longer *res integra* but is concluded by several authorities of this Court."

30. In the case of Bharatkumar Jaimanishanker Mehta v. State, 1982 (1) GLR 605, a Division Bench of this Court, relying upon the judgment of the Supreme Court in Rabindra Kumar Dey's case (supra), the relevant portion of which is quoted in para 12, has held as under:

> “It is true that after it is established that the accused accepted the amount, presumption under sec.4(1) of the Prevention of Corruption Act would arise. But for the purpose of coming to the conclusion as to whether the accused accepted the amount or not, the totality of the evidence led at the trial is required to be appreciated. The prosecution evidence alone cannot be considered for the purpose of coming to the conclusion as to whether the accused accepted the amount or not. The evidence led by the prosecution, the suggestions made by the defence in cross-examination of the prosecution witnesses, the version given by the defence and the defence witnesses, if any, examined at the trial, everything is required to be considered in its totality and it is to be seen as to whether the total effect of the entire evidence led before the Court is of a nature by which the only conclusion possible was that the accused accepted the amount. If such a conclusion is possible then alone it can be held that the prosecution established the case beyond reasonable doubt.”

31. Applying the principle laid down by the Supreme Court as well as this Court in the above referred to judgments to the facts of the present case, the explanation and assertions with regard to the conduct of the accused offered by him in his written statement tendered while recording

his further statement even though are not proved they should ordinarily be accepted unless the circumstances indicate that they are false. In the instant case, this Court has discussed the explanation offered by the accused by giving a written statement while recording his further statement and according to this Court, the prosecution has failed to prove that the explanation offered by the accused is false. On the contrary, according to this Court, the explanation offered by the accused is in consonance with the prosecution case as the accused has written several letters prior to laying the trap. If the accused was minded to take the bribe then he would not have informed the complainant as well as the Mandali and the District Registrar, Cooperative Societies with regard to non-repayment of the loan amount of Rs.4500 which was granted to Mandali and which was not utilized for the purpose for which it was sanctioned, till the date on which the trap was

laid.

32. On overall appreciation of the evidence of the prosecution witnesses, according to us, following points can be culled out:

(i) So far as motive for the demand of illegal gratification by the accused is concerned, it is absolutely absurd as complainant was not responsible to repay the amount of loan of Rs.4500 granted in favour of the Mandali. It was the Mandali which was responsible for repayment of the same.

(ii)The allegation that the complainant has paid Rs.1500/- prior to filing of the complaint for not taking action against him is absolutely got up and does not get corroboration from evidence of any independent witness. According to the complainant, at the time of paying Rs.1500 to the accused, Sadatkhan, the Tolat was present.

Though his statement was recorded he was not examined.

(iii) Both panchas are selectee belonging to same caste and from the same office.

(iv) Investigating Officer has over acted in selecting panchas as he has selected two persons from the same office situated at a distant place form his office though other Government offices are situated very near to his office and not inquired about the acquaintance of the complainant with the panchas.

(v) As per the oral testimony of the investigating officer, panchas are not the author of panchnama as it was dictated by him and taken down by Police Constable. Therefore, panchnama has no probative value.

(vi) Panch witness No.1 has not stated the correct

version as regards the authorship of the panchnama.

(vii) The manner in which the investigation was carried out by the investigating officer has also raised serious doubt as he has not inquired from the superior officer of the Mandali, such as, President, Vice President or any of the member of the managing committee with regard to the liability of repayment of Rs.4500/-.

(viii) The investigating officer has also not inquired whether the amount of Rs.1500 allegedly paid to the accused by the complainant at the first instance was the amount of the society or was of his personal money.

(ix)The investigating officer has admitted that the liability to repay the amount of Rs.4500/- was not personal responsibility of the complainant and therefore according to us there

was no earthly reason for the complainant to go to the accused and to request not to take any action against him.

(x) If the accused had determined to take bribe from the complainant then he would not have written several letters to the society asking the society to repay the loan amount and endorsed a copy of the said letter to his higher officer. In the instant case, the accused has written many letters to the society asking to repay the amount and copy of the same was endorsed to the District Registrar. The accused had written last letter on 4.10.1983 whereas the trap was laid on 11.12.1983. A copy of the said letter was sent to the District Registrar, Cooperative societies also. Therefore, there was a reason to believe that the trap was laid by the complainant with a view to entrap the accused by filing false complaint.

(xi) None of the witnesses examined by the prosecution is of sterling quality. Their evidence contradicts with each other. Evidence of the complainant is of such a nature which cannot be acted upon and accepted without corroboration of independent witness, i.e., panch and panch is also selectee and, therefore, one tainted source of evidence cannot get corroboration from another tainted source of evidence and the evidence of the investigating officer is also tainted as he lost credence by selecting panch as per the wish and will of the complainant and not inquired and investigated the case as he ought to have investigated.

(xii) The explanation offer by the accused in his explanation at Ex.58 for going to the house of the complainant is swallow-able, plausible and gulp-able.

(xiii) Since the accused was repeatedly

demanding to redeposit the amount of unutilised loan from the complainant, possibility cannot be ruled out to entrap the accused in a bribe case with a view to estop the accused from demanding to redeposit the unutilised loan amount of Rs.4500/-

33. In view of the discussion made in the foregoing paragraphs, we are of the considered opinion that the prosecution has utterly failed to establish the charge against the accused for demand, acceptance and recovery of the bribe money from the accused as ingredients which were required to be proved by the prosecution for bringing home the charge under section 161 of the IPC and Section 5 (1) (d) read with Section 5 (2) of the Act have not been proved. On the contrary, defence version is so much in consonance with the evidence adduced by the prosecution which go to establish that a false case is filed against the accused to entrap him in bribe case.

34. The learned Special Judge has committed no illegality or irregularity in coming to the conclusion that the prosecution has failed to prove the charge against the accused. We find ourselves in complete agreement with the said finding, ultimate conclusion and resultant order of acquittal as according to us no other conclusion is possible except the one reached by the learned Special Judge.

35. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible then also appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (See Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC

225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned Special Judge are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

36. In the case of RAM KUMAR V. STATE OF HARYANA, reported in AIR 1995 SC 280, Supreme Court has held as under:

> "The powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged

or demolished, the High Court should not disturb the order of acquittal."

37. It may be noted that this is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly, when the evidence has not inspired confidence of the learned Special Judge.

38. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Special Judge for acquitting the accused. Suffice it to say that the learned Trial Judge has given cogent and convincing reasons for acquitting the accused and the learned A.P.P. has failed to dislodge the reasons given by the learned Special Judge and convince this Court to take a view

contrary to the one taken by the learned Special Judge.

39. Seen in the above context, we do not find any valid reason or justifiable ground to interfere with the impugned judgment and order passed by the learned Special Judge acquitting the accused of the offences with which he was charged. Hence, the appeal lacks merit and deserves to be dismissed.

40. For the foregoing reasons the appeal fails and accordingly it is dismissed.

Muddamal to be destroyed in terms of the impugned judgment and order.

(A.M. Kapadia, J.)

(S.R. Brahmbhatt, J.)

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(karan)